

Combs liable under Mine Act section 110(c), 30 U.S.C. § 820(c),³ for the violation. 24 FMSHRC 176, 178-81 (Feb. 2002) (ALJ). The judge also dismissed two citations alleging violations of 30 C.F.R. §§ 50.10⁴ and 50.12.⁵ *Id.* at 186-88. The Commission directed sua sponte review of the dismissal of the Part 50 violations. The Secretary of Labor subsequently filed, and the Commission granted, a petition for discretionary review challenging the judge's negative unwarrantable failure and section 110(c) determinations as well as the dismissal of the Part 50 violations. For the reasons that follow, we affirm in part and reverse in part.

I.

Factual and Procedural Background

Cougar operated an underground coal mine located in Johnson County, Kentucky. Cougar was one of several mining companies owned and operated by James Booth and Ted McGinnis. In June 1999, mining had terminated at Cougar Mine No. 8 and the equipment was being moved to another location. 24 FMSHRC at 176.

Combs, a general mine manager, was in charge of moving the equipment at Cougar. *Id.* at 177 n.1. On the evening of June 15, 1999, Combs instructed miner Paul Preece, who was not

³ Section 110(c) provides in pertinent part: "Whenever a corporate operator violates a mandatory health or safety standard, . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to . . . civil penalties."

⁴ Section 50.10, entitled "Immediate notification," provides:

If an accident occurs, an operator shall immediately contact the [Department of Labor, Mine Safety and Health Administration ("MSHA")] District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Arlington, Virginia by telephone, at (800) 746-1553.

⁵ Section 50.12, entitled "Preservation of evidence," provides:

Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

a certified electrician, to saw off a power cable leading to the power center⁶ with a hacksaw the following day. *Id.* at 177, 179. Preece replied that he could save the line by ascending the A-1 pole and disconnecting the line at the cross-arm area. *Id.* at 179. Combs instructed Preece not to do that. *Id.*; Gov't Ex. 17. Combs further instructed Preece that if Coy Contractors, an independent contracting firm that handled electrical moves of power stations, was present at the site, Preece was to let its personnel disconnect the wire from the pole. 24 FMSHRC at 179. On the morning of June 16, 1999, Combs again instructed Preece to cut the high line at the entrance to the power center. *Id.* Preece once more suggested that he climb the A-1 pole to save the line, and Combs again told him not to do so. *Id.*; Tr. III 95-96.

A certified electrician had opened the three fused disconnects on the A-1 pole, so that by June 16, 1999, electricity was shut off to the high line cable and power center. Tr. I 96, 176-79; Tr. III 207, 257. However, the main line, which connected at the top of the disconnects, was still energized. Tr. I 96-100, 174-79; Tr. III 29-31. Later in the morning of June 16, Preece asked for, and was given, a "hot stick"⁷ by the foreman at the Cougar site, Rick Jarvis. 24 FMSHRC at 180, 185. Preece and another miner, Pat Cantrell, rode in a boom truck and disconnected three capacitors⁸ on a telephone pole located a distance from the power center, which Preece mistakenly believed disconnected all the power leading into the A-1 pole. *Id.* at 177; Tr. III 98-99.

Next Preece drove to the A-1 pole and climbed up the boom truck onto the pole. Tr. III 101; Jt. Stip. 10. In attempting to disengage the high line cable from the bottom of the disconnect structure, Preece's left arm inadvertently touched one of the live wires at the top of the disconnect structure. Tr. I 177-79; Tr. III 104-05; Gov't Ex. 22, at 10. As a result, Preece received a shock of 7,200 volts of electricity. 24 FMSHRC at 177. Preece fell a distance of approximately 18 feet. *Id.* at 177, 186; Jt. Stip. 11. Before landing on the ground, Preece hit his head on the edge of the power center. 24 FMSHRC at 177. He was found unconscious and without any pulse. *Id.* Jarvis administered cardiopulmonary resuscitation ("C.P.R.") to Preece and he revived. *Id.* at 177, 187; Gov't Ex. 16. Preece suffered lacerations to his head, serious

⁶ The power center or substation supplied electricity to the various underground equipment at the mine. 24 FMSHRC at 176-77. It was a portable unit, physically located on the ground. R. Ex. 5. The source of electricity for the power center was a high line cable extending from a utility pole above the power center ("A-1 pole"). 24 FMSHRC at 176-77. The high line cable, in turn, was attached to three high-voltage fused disconnect switches located on the middle cross-arm of the A-1 pole. *Id.* at 177. The disconnects work like switches, in that when they are opened and functioning properly, a visible gap is created that prevents power from flowing. Tr. I 46-48. Incoming power from the main circuit enters the top of the disconnects and outgoing power flows from the bottom. Tr. I 47.

⁷ A "hot stick" is an insulated pole with a hook on its end, which is used to open or close disconnect switches. 24 FMSHRC at 180; Tr. I 52.

⁸ Capacitors are electrical components that store electricity. Tr. I 171, 174-75.

burns, and a fractured vertebra in his neck. 24 FMSHRC at 177. Preece was taken from the mine site to the emergency department at a nearby hospital. *Id.* at 187. Later that day, Preece was transferred by helicopter to the burn unit at a hospital in West Virginia. *Id.*

Cougar did not inform the Department of Labor’s Mine Safety and Health Administration (“MSHA”) of the incident. *Id.* at 177, 186. MSHA became aware of it at approximately noon on the following day, June 17, 1999, when MSHA Inspector Donald Roby was inspecting another one of the McGinnis and Booth mines and miners told him what had happened to Preece. Tr. I at 30-37. Before MSHA investigated the incident, Cougar cut the high line, and moved both the power center and the boom truck that Preece was driving. 24 FMSHRC at 186. Cougar did not secure permission from MSHA before doing so. *Id.*

As a result of an investigation, MSHA issued a number of citations and orders. Of pertinence to the current proceeding on appeal, MSHA issued a section 104(d) order alleging a violation of section 77.501, and also alleged that Combs was liable under Mine Act section 110(c) for the section 77.501 violation. *Id.* at 177. MSHA also issued two section 104(a) citations alleging violations of sections 50.10 and 50.12. *Id.*

The matter proceeded to hearing before Judge Weisberger. The judge found that Cougar violated section 77.501 on the basis of a concession in its post-hearing brief. *Id.* at 178. He also determined that the violation was significant and substantial (“S&S”). *Id.* at 181-82. The judge credited the testimony of Combs that he did not instruct Preece to ascend the A-1 pole and disconnect the high line. *Id.* at 178-80. On that basis, the judge concluded that the Secretary had not established that Combs knowingly authorized, ordered, or carried out the section 77.501 violation, as provided under section 110(c) of the Mine Act. *Id.* Based on that analysis and finding no aggravated conduct on the part of foreman Jarvis, the judge determined that the violation was not caused by Cougar’s unwarrantable failure to comply with the standard. *Id.* at 180-82. In addition, the judge found no violation of sections 50.10 and 50.12, both of which are triggered by an occurrence of an “accident.” *Id.* at 186-88. He reasoned that because the Secretary failed to establish that an “accident” as defined in 30 C.F.R. § 50.2(h)(2)⁹ occurred, the Secretary did not prove that sections 50.10 and 50.12 were violated. *Id.*

II.

Disposition

A. Mine Act Section 110(c) Liability

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil

⁹ Section 50.2(h)(2) defines “accident,” in part, as “[a]n injury to an individual at a mine which has a reasonable potential to cause death.”

penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual “in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.” *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

The judge found that Preece’s action in ascending the A-1 pole and attempting to disconnect the high line cable violated section 77.501.¹⁰ 24 FMSHRC 178. He further ruled that the Secretary failed to establish that Combs authorized Preece to climb the pole and disengage the line. *Id.* at 180. The judge’s determination of no section 110(c) liability is based on his credibility determination that Combs expressly prohibited Preece on two separate occasions from ascending the pole. *Id.* at 179. The Commission has long held that a judge’s credibility determinations are not to be overturned lightly and are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998). Additionally, two witnesses testified to hearing Comb’s explicit prohibition that Preece not ascend the pole. Tr. III 84, 95-96.

Substantial evidence¹¹ further supports the judge’s finding that Combs did not commit a

¹⁰ Our dissenting colleague states that Combs’ instruction to Preece to saw the de-energized cable at the power station could be the basis for section 110(c) liability because there is no Mine Act requirement that an order, which might be violative if executed, be followed before a citation can issue. Slip op. at 12. We disagree. Section 110(c) is clear in premising individual liability on “knowingly ordered” violations of mandatory health and safety standards. 30 U.S.C. § 820(c). *See also* 30 U.S.C. §§ 814(a) and (d). Whether a supervisor’s order establishes a violation is dependent on whether and how it is carried out. Premising section 110(c) liability on Combs’ unexecuted order is too contingent and hypothetical, particularly in light of Preece’s decision to ignore the order and climb the pole.

¹¹ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305

knowing authorization of the section 77.501 violation. Combs testified that he did not consider the cutting of the de-energized high line cable with a hacksaw while standing on the ground to be electrical work. Tr. III 255. Similarly, both MSHA Inspectors testified that cutting the cable with a hacksaw posed virtually no risk of injury. Tr. I 97-98; Tr. II 340. In addition, Preece's actions were aberrant and idiosyncratic. We agree with the judge that there is simply no evidence in the record that showed that Preece had on any occasion disregarded an order of a supervisor. 24 FMSHRC at 180. The record also showed that Preece had worked with Combs for six years. Tr. III 233. Hence it was not foreseeable that Preece would act contrary to the direct order of his supervisor. *Cf. Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 258-262 (Mar. 1988) (affirming judge's finding of no operator negligence when miner disobeyed order of a supervisor and caused a violation of Mine Act).

In sum, we affirm, as supported by substantial evidence in the record, the judge's dismissal of the section 110(c) violation against Combs.

B. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission determines whether conduct is aggravated in the context of unwarrantable failure by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy*, 14 FMSHRC at 1243-44; *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). Supervisors and foremen are held to high standard of care in an unwarrantable analysis. *Midwest Material*, 19 FMSHRC at 35. All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or

U.S. 197, 229 (1938)). Under this test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The judge found that Preece's actions in ascending the pole violated section 77.501, but that Combs did not authorize Preece to undertake such an action. 24 FMSHRC at 178-80. As discussed in the preceding section, Preece's climb up the pole constituted unforeseeable conduct on the part of a rank-and-file miner. Under Commission precedent, the aggravated conduct of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure. *Martin Marietta Aggregates*, 22 FMSHRC 633, 636 & n.6 (May 2000); *Wayne Supply Co.*, 19 FMSHRC 447, 452-53 (Mar. 1997). However, an operator may be held responsible for an unwarrantable failure based on its own conduct. *Id.* As the Commission has stated:

[W]here a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct.

Wayne, 19 FMSHRC at 452-53 (quoting *S. Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("*SOCCO*") (emphasis omitted)).

Applying this doctrine, we note that Combs expressly prohibited Preece on two separate occasions from ascending the pole. 24 FMSHRC at 179. Nor was there any reason for Combs to believe that Preece would disobey his instructions or that he would need direct supervision because they had worked together for six years. Tr. III 233. We agree with the judge when he rejected the Secretary's argument that Cougar should have more closely supervised Preece. 24 FMSHRC at 180. As the judge found, "[t]here [was] no evidence to suggest that Preece had on any occasion, disregarded an order of a supervisor or had proceeded to act contrary to such an order." *Id.* Thus, we fail to find any aggravated conduct on the part of Cougar. See *SOCCO*, 4 FMSHRC at 1464-65 (providing that when rank-and-file miners knowingly behave in a manner contrary to safety instructions, their negligence is not imputable to the operator).

The Secretary claims that Cougar's violation should be deemed unwarrantable because of Combs' initial instruction to Preece to cut the line. S. Br. at 10-11. We are not convinced. As Cougar asserts (C. Br. at 9), had Preece followed the two explicit instructions of Combs, cutting the disconnected high line with a hacksaw would have posed no risk of danger to Preece. Even the Secretary's witnesses, Inspectors Bartley and Justice, testified that cutting the high line at the entrance of the power center would pose no risk of electrical shock. Tr. I 97-98; Tr. II 340. In light of the low level of danger associated with Combs' instruction, this is an inadequate basis to overturn the judge's determination that the violation was not a result of unwarrantable failure.¹²

¹² In light of the fact that the Secretary does not argue on appeal that foreman Jarvis' actions contributed to an unwarrantable failure, we affirm the judge's finding that the Secretary failed to establish that a finding of unwarrantable failure could be based on Jarvis' actions. 24 FMSHRC at 181.

On the basis of substantial evidence in the record, we affirm the judge's determination that the violation of section 77.501 was not a result of unwarrantable failure.

C. Violations of Sections 50.10 and 50.12

The judge correctly determined that both section 50.10, requiring immediate notification, and section 50.12, requiring preservation of evidence, are triggered by an occurrence of an "accident." 24 FMSHRC at 186. "Accident" is defined in section 50.2(h)(2) as "[a]n injury to an individual at a mine which has a reasonable potential to cause death." The judge, applying the plain terms of section 50.2(h)(2), evaluated whether Preece's injuries had a reasonable potential to cause death. 24 FMSHRC at 186. He then summarized the parties' stipulations, stating that "Preece received an electric shock of exposure to 7,200 volts and as a result fell 18 feet . . . , and hit his head on the edge of the power center before hitting the ground; that he was found on the ground with no pulse" *Id.* at 186-87. We find that the judge did not need to continue his analysis beyond the stipulations. The record indicates that Preece did not have a pulse when he was found by foreman Jarvis. 24 FMSHRC at 177, 187; Gov't Ex. 16. Furthermore, we hold that the near electrocution, combined with Preece's 18-foot fall and the hitting of his head on the power center, had a reasonable potential to cause death per se. Because the record supports no contrary determination, we reverse the judge's conclusion and hold that an accident, as it is defined in section 50.2(h)(2), occurred. *Power Operating Co.*, 18 FMSHRC 303, 306-07 (Mar. 1996); *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993).

We are not persuaded by Cougar's assertion, and the judge's reliance thereon, that because Preece was conscious and alert when management personnel arrived at the scene, they could reasonably surmise that Preece's injuries lacked the potential to cause death. 24 FMSHRC at 188. Looking at the evidence after Preece was revived by C.P.R., the record does show that Preece was conscious and somewhat alert when he talked to Cougar high management official McGinnis as he was being taken by an ambulance from the mine site. Tr. III 245, 280-82. However, Cougar's assertion overlooks two important points. First, a Cougar foreman performed C.P.R. on Preece (Gov't. Ex. 16; 24 FMSHRC at 187), and so the knowledge that Preece lost his pulse is imputable to Cougar. *Capitol Cement Corp.*, 21 FMSHRC 883, 894 (Aug. 1999); *SOCCO*, 4 FMSHRC at 1463-64 (noting that "operators typically act in the mines only through such supervisory agents."). Second, and perhaps most significantly, the very fact that Preece needed C.P.R. indicates that his injury had a reasonable potential to result in death.

The Secretary rightly takes issue with the judge's legal test for determining whether an "accident" has occurred that distinguishes between the act of injury and the damages suffered as a result of the act. 24 FMSHRC at 186-87. The judge incorrectly discounted testimony relating to the "nature of the accident" or the "act of the accident" as irrelevant to the question of whether the injuries had a reasonable potential to cause death. *Id.* at 187. For example, Inspector Bartley testified that he never separated the accident from the injuries, but considered the whole picture: "I mean, you sustain the injuries in the accident. I don't know how you can separate." Tr. II 291. The judge also erroneously discredited the inspector's opinion on Preece's injuries and required that the Secretary furnish a medical opinion that Preece's injuries had a reasonable potential to cause death. 24 FMSHRC at 187-88.

In analogous circumstances, the Commission has long held that an opinion of an inspector is sufficient, by itself, to establish that a hazard had a “reasonable likelihood” of producing a “reasonably serious injury” under the analysis of whether a violation is significant and substantial (“S&S”). *Power Operating*, 18 FMSHRC at 306-07; *Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993). *Accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). In addition, in that S&S analysis, the Commission has recognized that “[a]s a practical matter,” the showing that a hazard was reasonably likely to produce an injury and the showing that the injury was reasonably likely to be reasonably serious “will often be combined in a single showing.” *Mathies Coal Co.*, 6 FMSHRC 1, 4 (Jan. 1984). If we were to accept the judge’s construction, a medical or clinical opinion of the potential of death would be needed before an accident is even determined to be reportable under section 50.10. Such a construction would serve to frustrate the immediate reporting of near fatal accidents. See *Donovan on behalf of Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 959 (D.C. Cir. 1984) (providing that the Mine Act should not be administered in a hypertechnical and purpose-defeating manner); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993) (rejecting judge’s construction that would thwart standard’s purpose and lead to absurd results). In the field, the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner’s chance of survival. The decision to call MSHA must be made in a matter of minutes after a serious accident.

This leads to the question of whether sections 50.10 and 50.12 were violated. The parties stipulated and the judge found that “[a]fter the accident [involving Preece], Cougar moved a boom truck and high-voltage power center from the accident site without first obtaining the permission of MSHA.” 24 FMSHRC at 186. The judge also found, based on stipulation, that after the accident the operator failed to notify MSHA immediately. *Id.* at 177. Thus, there is no dispute that Cougar violated sections 50.10 and 50.12. *American Mine*, 15 FMSHRC at 1834.

Cougar defends its failure to contact MSHA immediately on the grounds that the regulations are not clear in that Preece’s injury could fall under the definition of “occupational injury” set forth in 30 C.F.R. § 50.2(e), for which there is a ten-day reporting requirement.¹³ We note that Preece’s injuries also fit the definition for occupational injury and therefore the potential exists for some confusion in the reporting requirements.¹⁴ We do not perceive any lack

¹³ Section 50.2(e) defines “occupational injury” as “any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties” 30 C.F.R. § 50.2(e). Section 50.20 provides in pertinent part: “The operator shall mail completed [Mine Accident, Injury, and Illness Report] forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.” 30 C.F.R. § 50.20(a).

¹⁴ According to the preamble to proposed Part 50, published twenty-five years ago in the Federal Register, all accidents must be reported immediately and that “[u]nder § 50.20 all accidents must be reported, as must all occupational injuries and illnesses, whether or not accident related” in writing within 10 days of their occurrence. 42 Fed. Reg. 55,568 (Oct. 17,

of notice on the part of Cougar here due to the per se nature of the accident. However, it would benefit the mining community if the Secretary would clarify when it is urgent to notify MSHA, when it is not, and what reports are required. It would be preferable to provide such clarification in the standards themselves. *See* n.14, *supra*.

In sum, we reverse the judge's dismissals and find violations of sections 50.10 and 50.12 based on undisputed record evidence. We remand to the judge for the assessment of penalties. On remand, if the judge perceives any confusion in the Part 50 reporting requirements, he should consider it as a mitigating factor for penalty purposes. *See King Knob Coal Co.*, 3 FMSHRC 1417, 1422 (June 1981) (providing that confusion caused by MSHA policy statements justified reducing element of negligence for penalty purposes).¹⁵

1977). Under the preamble, there appears to be a dual reporting requirement such that, even if one were to characterize an injury as an occupational injury, an operator would not be excused from immediately reporting it if it met the qualification of an accident as well. Nonetheless, this preamble does not appear in the Code of Federal Regulations, to which most operators refer.

¹⁵ Because we conclude that an accident occurred on the basis of the record in this case, the Secretary's judicial notice request, seeking review of supplemental material showing that burns and fractures may result in death, is moot. *Sec'y of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1538 n.10 (Sept. 1997) (declining to address judicial notice request when no longer at issue).

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that Combs was not liable under section 110(c) and Cougar's violation of section 77.501 was not a result of unwarrantable failure. We also reverse the judge's dismissal of the violations of sections 50.10 and 50.12, find violations of those sections, and remand for the assessment of appropriate civil penalties.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Commissioner Beatty, dissenting in part:

While I agree with my colleagues that we should reverse the judge's determinations that Cougar did not violate 30 C.F.R. §§ 50.10 and 50.12, I must respectfully dissent from the majority's decision to affirm the judge's unwarrantability and section 110(c) liability findings with respect to 30 C.F.R. § 77.501.

The record in this case suggests that much of the Secretary's case regarding the violation of section 77.501 focused on Preece's decision to climb the A-1 pole and attempt to disconnect the high line cable. In fact, this is exactly what the judge focused on in determining the violation was not unwarrantable and that Combs was not liable for it under section 110(c). 24 FMSHRC at 178-82. While this was one of the theories advanced by the Secretary, the record is very clear that the Secretary also presented evidence to support an alternative theory: that Preece would have also violated the regulation if he had followed Combs' instructions to cut the high line with a hacksaw. Had he followed through on this order, Preece would have been considered an unqualified person performing electrical work under the regulations. Tr. I 192-95, 218-22. Consequently, the Secretary advanced the theory at trial that the operator was in violation of section 77.501 on this point alone, and that the violation was unwarrantable, and that Combs was liable under section 110(c) because he had issued the order. S. Post-Hr'g Br. at 48-51.

In addressing this issue the judge did not analyze the unwarrantability and 110(c) issues in connection with Combs' decision to direct Preece to cut the high-voltage line with a hacksaw. See slip op. at 3 & n.6. The judge reasoned that since Preece did not follow through on Combs' order to cut the high-voltage line, the section 77.501 violation issued to Cougar was based only on Preece's climbing the A-1 pole. 24 FMSHRC at 179 n.2.

In my view, the judge's analysis on this point is flawed for a couple of reasons. First, I am unaware of any requirement in the Mine Act that a miner must actually carry out an order to violate a regulation before a citation can issue. It appears to me that such a requirement would have a significantly adverse impact on miner safety.¹ Second, while the order charging Cougar

¹ My colleagues rely on various Mine Act sections to conclude that "[w]hether a supervisor's order establishes a violation is dependent on whether and how it is carried out." Slip op. at 5 n.10. The legislative history of the Mine Act is clear, however, that miners are not to acquiesce to unsafe conditions but to take an "active part in the enforcement of the Act." S. Rep. No. 95-181, at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978). Moreover, under the majority's rationale that an unexecuted order cannot provide the basis for section 110(c) liability (slip op. at 5 n.10), even a supervisor issuing an order requiring a miner to engage in a serious violation of the Mine Act would be exempt from liability under section 110(c) so long as the miner refused to follow the order. I cannot agree with such an approach.

with the section 77.501 violation is by no means a model of clarity,² the record is clear that the Secretary provided Cougar with ample notice that she was also charging that Combs' instruction to Preece to cut the high-voltage line was a separate and distinct violation of section 77.501. Moreover, the record clearly establishes that the Secretary was also pursuing a finding of unwarrantability and section 110(c) liability against Combs in connection with the alleged violative condition. Tr. I 192-95, 218-22. Since that is all that was required of the Secretary in presenting her case (*see Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997)), the judge was required by Commission Procedural Rule 69 to consider and rule upon the Secretary's arguments in this regard. *See* 29 C.F.R. § 2700.69(a) (stating that a judge's decision "shall include all findings of fact and conclusions of law, and the reasons for bases for them, *on all the material issues of fact, law or discretion presented by the record*") (emphasis added).

On review, the Secretary is requesting reversal of the judge's unwarrantability and 110(c) findings based on the theory that Combs' order that Preece cut the high-voltage line violated section 77.501. S. Br. at 10-18. In fact, the Secretary's brief rests *entirely* on this alternate theory which she advanced during the trial. *Id.* Interestingly, Cougar's counsel, in his response brief, concedes that Combs instruction was a violation of section 77.501. C. Br. at 8-9.³ Unfortunately, the judge did not address this issue in his decision. Given these facts, I cannot join my colleagues in the majority to affirm the judge on the issues of unwarrantability and 110(c) liability. Simply stated, the majority's decision to affirm does not address the issues raised by the Secretary, but instead addresses a theory of this case on which neither of the parties appear to disagree.

Thus, I think the need for a remand on the unwarrantability and 110(c) issues is plain. In my view, the Commission should not be making determinations on special findings regarding

² The order issued to Cougar states:

Electrical work, (disconnecting of a high-voltage cable) was being conducted on the surface area of the mine by a non-qualified person (electrical). The operator failed to de-energize and ground all lines supported on this pole while work was being performed. A serious accident occurred while an employee was conducting this work. There were no qualified electricians on mine property at the time of the accident. A certified mine foreman was within 100 feet, (in clear view) of the power pole where the work was being conducted. There was not an electrically certified person on mine property at the time of the accident.

Gov't Ex. 12.

³ Cougar's counsel had previously conceded the same point at the hearing. Tr. I 223.

conduct that the judge should have addressed, but did not, in determining whether there had been a violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 362-64 (Mar. 2000) (remanding for determination of unwarrantability on all allegations of violative conduct despite judge's determination that violation he found was not unwarrantable). As the majority opinion demonstrates, to do so the Commission has to make the necessary findings of fact and conclusions of law on the matter in the first instance. This is not the Commission's role under the Mine Act. See *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

In light of my belief that remand is plainly called for in this case, I will not offer a critique of the substance of the majority's affirmance of the judge's unwarrantability and section 110(c) findings.

Robert H. Beatty, Jr., Commissioner

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